No. 17-988

# In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

*Petitioners,*

v.

FRANK VARELA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR PETITIONERS


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## QUESTION PRESENTED

Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

## RULE 29.6 STATEMENT

Petitioner Lamps Plus Holdings, Inc. is the parent corporation to petitioners Lamps Plus, Inc. and Lamps Plus Centennial, Inc. No publicly held corporation owns a 10% or more ownership interest in Lamps Plus, Inc.; Lamps Centennial, Inc.; or Lamps Plus Holdings, Inc.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 701 F. App'x 670. The order of the court of appeals denying rehearing (Pet. App. 6a) is unreported. The order of the district court denying in part Lamps Plus's motion to compel individual arbitration and instead compelling arbitration on a class-wide basis (Pet. App. 7a-23a) is unreported, but is available at 2016 WL 9110161.

## JURISDICTION

The judgment of the court of appeals was entered on August 3, 2017. Pet. App. 1a. That court denied rehearing on September 11, 2017. Pet. App. 6a. Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including January 10, 2018. The petition for a writ of certiorari was filed on January 10, 2018, and granted on April 30, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

## STATEMENT

"[T]he differences between bilateral and class-action arbitration are too great" for arbitrators or courts to presume "that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). Because "class arbitration" is "not arbitration as envisioned by the" Federal Arbitration Act (FAA) and "lacks its benefits," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-51 (2011), arbitrators or courts may not infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687.

The Ninth Circuit, by a divided vote, did just that by inferring that the parties had implicitly agreed to class arbitration based on the inclusion in the agreement of standard arbitration-clause provisions.

This Court, however, has squarely held that the FAA "requires more" (*Stolt-Nielsen*, 559 U.S. at 687). In particular, there must be a "contractual basis for concluding" that the parties have in fact "*agreed* to"

class arbitration (*id.* at 686). That principle follows naturally from the FAA's "rule[] of fundamental importance" that "arbitration 'is a matter of consent, not coercion.'" *Id.* at 681 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). For that reason, this Court has held, "[a]n arbitrator may employ class procedures *only* if the parties have authorized them." *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 565 (2013) (emphasis added).

As Judge Fernandez succinctly observed in dissent, the decision below is a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. The panel majority simply disregarded numerous terms in the parties' arbitration agreement that contemplate bilateral arbitration, and instead purported to divine contractual consent to class arbitration from language found in virtually any standard arbitration clause.

The panel protested otherwise, but its decision involved precisely the type of state-law "interpretive acrobatics" (Pet. App. 3a) in support of a policy preference for class actions that this Court has rejected as incompatible with the FAA. See *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-71 (2015). The Court should reverse the decision below.

**A. Factual Background.**

Respondent Frank Varela is an employee of Lamps Plus. Pet. App. 8a. At the beginning of his employment, Varela and a representative of Lamps Plus signed a standalone arbitration agreement (the "Agreement"). *Id.* at 24a-35a.[1]

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[1] Employees are permitted to opt out of arbitration within three days after executing the agreement. Pet. App. 27a; ER

The Agreement covers "all claims or controversies ('claims'), past, present or future that I may have against the Company or against its offers, directors, employees or agents * * * or that the Company may have against me." Pet. App. 24a. The Agreement further provides: "Specifically, the Company and *I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment, or any of the parties' rights and obligations arising under this Agreement." *Id.* at 24a-25a (emphasis added).

The Agreement also informs the employee at the outset that agreeing to arbitration waives any right to resolve disputes with Lamps Plus in court:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

Pet. App. 24a.

The Agreement specifies that the arbitration will be administered by either the American Arbitration Association (AAA) or JAMS (Pet. App. 25a)—two widely-respected arbitration forums.[2] The arbitrator,

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138. ("ER __" refers to the Excerpts of Record in the court of appeals.) Varela did not opt out of arbitration. Pet. App. 10a; ER 138.

[2] It is undisputed (see ER 137-138) that Varela's arbitration agreement includes both the document he signed titled "ARBI-

once appointed, "is authorized to award any remedy allowed by applicable law." *Id.* at 26a.

**B. Proceedings Below.**

1. In early 2016, Lamps Plus was the victim of a successful phishing attack. An unknown third party mimicked the email address of a high-level Lamps Plus employee and sent an email to an actual Lamps Plus employee requesting the W-2 tax forms of employees. ER 152. The employee, believing she was responding to a supervisor's legitimate request, sent copies of current and former employees' 2015 W-2 forms to the third party. Pet. App. 11a; ER 152. Lamps Plus promptly notified its employees of the attack and offered employees "one-year of credit monitoring services" and "identity counseling." ER 181.

2. Soon after this cyber attack, respondent Varela filed a putative class action lawsuit in California federal court, asserting statutory and common-law claims related to the data breach. ER 178-202. Lamps Plus moved to "compel arbitration on an individual basis" pursuant to Varela's arbitration agreement. ER 144.

The district court purported to grant the motion, but in fact denied the request for individual arbitration and instead ordered a class-wide arbitration. Pet. App. 20a-22a. The district court recognized that Varela had entered into a binding arbitration agree-

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TRATION PROVISION" (Pet. App. 24a) as well as "ATTACHMENT A," which sets forth in more detail the "LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES" (*id.* at 29a), including presumptive limits on discovery and other provisions consistent with bilateral arbitration. See pages 17-18, *infra*.

ment and that his claims fell within the scope of that agreement. *Id.* at 13a-14a. The court further rejected Varela's arguments that his arbitration agreement was unconscionable. *Id.* at 15a-20a.

On the issue of class arbitration, however, the district court accepted Varela's argument that "the language stating that 'all claims' arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter." Pet. App. 21a.[3]

3. A divided Ninth Circuit panel affirmed the district court's order. Pet. App. 1a-5a.

The panel majority concluded that there was "ambiguity" as to whether the parties had agreed to class arbitration, pointing to the following language in the arbitration provision:

- the waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";

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[3] In interpreting the arbitration agreement to authorize class arbitration, the district court also sua sponte questioned whether a waiver of class procedures in arbitration would be enforceable in the employment context; one factor in the district court's decision was its view that, under then-extant Ninth Circuit case law, the "enforceability of a class arbitration waiver in the employment contest" was "dubious." Pet. App. 22a. But this Court has since reversed the Ninth Circuit, holding that agreements to arbitrate on an individual basis in the employment context are fully enforceable under the FAA. See *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018).

- the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

Pet. App. 3a.

Based on this language, the majority maintained that "*the most reasonable*[] interpretation of this expansive language is that it authorizes class arbitration." Pet. App. 3a.

The majority further inferred "support[]" for its interpretation from (1) the *absence* of any express reference to class actions in other parts of the arbitration clause; (2) the arbitration clause's coverage of all "claims or controversies" that the parties might have against each other; and (3) the provision in the arbitration clause authorizing the arbitrator to "'award any remedy allowed by applicable law.'" Pet. App. 3a-4a. The majority also relied upon the state-law *contra proferentem* doctrine that contractual ambiguities should be "construed against the drafter." *Id.* at 3a-4a.

Judge Fernandez dissented. His dissent stated in full:

> I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen* * * *.

Pet. App. 5a (citation omitted).

## SUMMARY OF ARGUMENT

The decision below defies this Court's clear holdings that the FAA preempts state law that would compel parties to submit to class arbitration without a contractual basis for concluding that the parties agreed to authorize that procedure.

The Court has repeatedly explained that, in light of the fundamental differences between class and individual arbitration, the FAA prohibits exactly what the panel below did here: inferring "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685; accord *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring).

The Ninth Circuit sought to avoid the FAA's preemptive force by characterizing its interpretation as an application of ordinary state contract interpretation principles. But its justifications are at odds with this Court's precedents.

*First*, the Court explained in *Stolt-Nielsen* that, "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 559 U.S. at 681 (citations omitted). Accordingly, the "FAA requires more" (*id.* at 687)—as a matter of substantive federal law—than "the fact of the parties' agreement to arbitrate" in order to infer an agreement to authorize class arbitration (*id.* at 685). There is nothing "more" in this agreement, and accordingly no basis for ordering class arbitration.

*Second*, the panel's assertion that it applied neutral state-law principles does not withstand scrutiny.

Rather, its interpretation of the contract in favor of its preference for class procedures is even more implausible than the strained reading of contract language that this Court rejected in *Imburgia*, 136 S. Ct. at 468-71, as inconsistent with the FAA.

*Third*, the panel's erroneous interpretation cannot be salvaged by relying on the state-law *contra proferentem* doctrine. Because the Agreement is "not ambiguous" (Pet. App. 5a (Fernandez, J., dissenting)), the *contra proferentem* principle is not even implicated. And in all events, that state-law interpretive canon cannot manufacture the contractual basis for class arbitration that the FAA requires as a matter of federal law.

Indeed, if the decision below were affirmed, courts would have virtual carte blanche authority to impose class arbitration whenever the parties' arbitration agreement does not expressly forbid class arbitration. That result would turn *Stolt-Nielsen* on its head. And even on its own terms, the Ninth Circuit's policy preference for class procedures ignores the numerous benefits of traditional, bilateral arbitration that this Court has repeatedly recognized.

*Fourth*, although the Ninth Circuit's decision must be reversed under *Stolt-Nielsen* because nothing in the arbitration provision suggests that the parties here agreed to authorize class arbitration, the Court may wish to answer the question left open in *Stolt-Nielsen* and articulate the "contractual basis [that] may support a finding that the parties agreed to authorize class-action arbitration." 559 U.S. at 687 n.10. If it chooses to address that issue, the Court should hold that a "clear and unmistakable" authorization of class, collective, or aggregate arbitration in

the contractual text is required to construe an agreement to authorize class arbitration.

Because bilateral arbitration is the default mode of arbitration "envisioned by the FAA" (*Concepcion*, 563 U.S. at 348), parties must clearly specify that they wish to pursue arbitration under a different set of procedures. The "clear and unmistakable" standard is consistent with what this Court has required in other contexts to assess whether the parties have departed from the FAA's default mode for arbitration, such as to find an agreement delegating to the arbitrator threshold questions of arbitrability—which are presumptively for a court to decide.

## ARGUMENT

### I. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

The Ninth Circuit's interpretation of the parties' arbitration agreement to authorize class arbitration cannot be squared with the FAA and this Court's precedents interpreting it.

#### A. Because Bilateral Arbitration Is The Type Of Arbitration Envisioned By The FAA, The FAA Requires A Contractual Basis For Class Or Other Representative Arbitration.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House*, 534 U.S. 279, 289 (2002) (quotation marks omitted). The "primary purpose" of the FAA is to "ensur[e] that private agreements to

arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

An agreement to arbitrate on an individual basis—termed "bilateral arbitration"—is the type of informal, expedient proceeding "envisioned by the FAA." *Concepcion*, 563 U.S. at 351. As this Court has explained on multiple occasions, in bilateral arbitration the "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Id.* at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

The "virtues Congress originally saw in arbitration" are "its speed and simplicity and inexpensiveness." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018). Accordingly, "one of arbitration's *fundamental* attributes" is its "individualized nature." *Id.* at 1622. And for that reason, the FAA "protect[s] pretty absolutely" agreements to arbitrate using "individualized rather than class or collective action procedures." *Id.* at 1621.

"Class arbitration"—by contrast—is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). That is because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348; accord *Epic Sys.*, 138 S. Ct. at 1623.

Before reaching the merits, the arbitrator "must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Concepcion*, 563 U.S. at 348. "All of [this] would take much time and effort, and introduce new risks and costs for both sides." *Epic Sys.*, 138 S. Ct. at 1623. Moreover, the delays inherent in class arbitration are undeniable: In *Concepcion*, the Court cited statistics showing that class arbitrations take years to resolve instead of months—and ***none*** of the hundreds of class arbitrations referenced by the Court ended with "a final award on the merits." 563 U.S. at 348-49.

Class arbitration also "greatly increases risks to defendants"—and those risks are compounded by the limited judicial review available. *Concepcion*, 563 U.S. at 350. Many defendants are willing to forgo meaningful judicial review in an individual arbitration because of their desire for a less costly and less adversarial method of resolving disputes. See *ibid.*; *Stolt-Nielsen*, 559 U.S. at 685. But the calculus changes "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," creating an "unacceptable" risk of error and subjecting defendants to the hydraulic pressure of "settling questionable claims." *Concepcion*, 563 U.S. at 350; see also *Stolt-Nielsen*, 559 U.S. at 686 (explaining that the "commercial stakes of class-action arbitration are comparable to those of class-action litigation").

Of course, "parties may and sometimes do agree to aggregation." *Concepcion*, 563 U.S. at 351. But the FAA "imposes certain rules of fundamental importance, including the basic precept that arbitration

'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 559 U.S. at 680 (quoting *Volt*, 489 U.S. at 479).

The Court therefore held in *Stolt-Nielsen* that the FAA imposes an affirmative requirement limiting the circumstances in which "a party may * * * be compelled under the FAA to submit to class arbitration": a "contractual basis for concluding" that the parties have "*agreed* to" that procedure. *Id.* at 684, 686. Because "class-action arbitration changes the nature of arbitration to such a degree," courts may *not* "presume[]" such consent from "mere silence on the issue of class-arbitration" or infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687. Instead, as a matter of substantive federal law, "the FAA requires more." *Id.* at 687.

The Court has not yet answered what "more" is required: Because the parties in *Stolt-Nielsen* had stipulated "that there was 'no agreement' on the issue of class-action arbitration," this Court left open the question of "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." 559 U.S. at 687 n.10.

The Court need not answer that question definitively here, because under any test the court of appeals erred by relying upon considerations that are incompatible with *Stolt-Nielsen* and this Court's other FAA precedents. If the Court chooses to address that issue, it should hold that an arbitration agreement must clearly and unmistakably authorize class or representative arbitration before the parties may be subjected to those procedures. See pages 27-29, *infra*.

### B. The Ninth Circuit's Inference Of An Agreement To Class Arbitration Lacked Any Contractual Basis.

#### *1. The provisions relied upon by the Ninth Circuit do not support an agreement to arbitrate using class procedures.*

None of the contract provisions relied on by the panel majority even remotely supports an inference that the parties "agreed to authorize" class arbitration.

To begin with, the panel relied on the Agreement's statement that the employee's agreement to arbitrate is a "waiver of 'any right I may have to file a lawsuit or other civil action or proceeding relating to *my* employment with the Company'" and of "'any right I may have to resolve employment disputes through trial by judge or jury.'" Pet. App. 3a (emphasis added). But as this Court recently reiterated, "a waiver of the right to go to court and to receive a jury trial" is "*the primary characteristic* of an arbitration agreement." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017) (emphasis added).

The panel's reasoning thus renders *Stolt-Nielsen* a nullity. If contractual language describing arbitration's "primary characteristic" were enough, then *any* arbitration agreement that does not expressly waive class procedures could support an inference that the parties agreed to class arbitration. But this Court has clearly held that "the FAA requires more" than "the fact of the parties' agreement to arbitrate" to support an "implicit agreement to authorize class-action arbitration." 559 U.S. at 685.

Similarly, the language in the Agreement that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (Pet. App. 3a) simply means that arbitration replaces litigation in court. See, *e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "in lieu of" as "[i]nstead of or in place of"); WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY (Deluxe ed. 1996) (similarly defining "in lieu of" as "instead of" or "in place of"). Contrary to the court of appeals' view, this phrase does not mean that the arbitration will duplicate every *procedure* available in court, such as the class device.

Indeed, under the majority's approach, that language would also entitle a party to demand that the arbitration process include other court procedures unless the agreement expressly disclaims them, including "the Federal Rules of Civil Procedure" and "a discovery process rivaling that in litigation." *Concepcion*, 563 U.S. at 351. But those procedures, like the class-action device, are "not arbitration as envisioned by the FAA" and "lack[] its benefits." *Ibid.* General language stating the obvious proposition that arbitration is a substitute for court proceedings cannot support an inference that the parties agreed to jettison the "fundamental attributes of arbitration," including "*streamlined* proceedings." *Id.* at 344 (emphasis added).

Moreover, the fact that the arbitration provision encompasses a broad range of substantive disputes—another factor cited by the court of appeals (Pet. App. 4a)—says nothing about the procedures under which the arbitration will be conducted; in particular, the language does not address whether class procedures are available for the resolution of any dispute. In other words, this portion of the Agreement simply

demonstrates that Varela and Lamps Plus agreed "to submit their disputes to an arbitrator"—nothing more. That agreement is precisely what this Court held *cannot* supply the basis for "[a]n implicit agreement to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 685.[4]

For similar reasons, the Agreement's provision authorizing the arbitrator to "'award any remedy allowed by applicable law'" cannot support the panel majority's interpretation. Pet. App. 4a. A class action is not itself a claim or a remedy, but instead a procedural device for aggregating individual claims.

Nearly four decades ago, this Court recognized that the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). The panel majority itself acknowledged this rule, stating that "a class action is a procedural device * * * rather than a separate or distinct claim." Pet. App. 4a (quotation marks omitted). Yet the court failed to recognize that its flawed interpretation of the Agreement runs headlong into that rule.

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[4] Notably, the Agreement states only that the AAA or JAMS employment arbitration rules shall apply (Pet. App. 25a-26a, 29a). It does not refer to the AAA Supplementary Rules for Class Arbitrations (see https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf) or the JAMS Class Action Procedures (see https://www.jamsadr.com/rules-class-action-procedures/).

*2. The Ninth Circuit did not meaningfully address the Agreement's language contemplating bilateral arbitration.*

The panel majority compounded its error by brushing aside multiple portions of the Agreement's text demonstrating the parties' intent to engage in traditional, bilateral arbitration. For example, the Agreement limits the scope of the claims covered by arbitration to "claims or controversies" that "*I* may have against the Company * * * or that the Company * * * may have against *me*" "aris[ing] in connection with *my* employment, or any of the parties' rights and obligations arising under *this Agreement*." Pet. App. 24a-25a (emphasis added).

Yet the majority concluded that this repeated use of singular personal pronouns was irrelevant because "Varela's claims against the company include those that could be brought as part of a class." *Id.* at 4a.

That analysis makes no sense. Because a class action is nothing more than the sum of each class member's individual claims, Rule 23—which, like other rules of civil procedure, does not apply in arbitration—cannot transform the claims of *other* employees into *Varela*'s claims, and those other individuals' claims plainly do not relate to *Varela*'s employment with Lamps Plus.

The majority further asserted that the Agreement's reference to claims that "'would have been available to the parties by law'" "obviously include[s] claims as part of a class proceeding." Pet. App. 4a. But as discussed above, a class action is not itself a claim or a remedy, and nothing in an agreement to resolve a broad range of substantive disputes indi-

cates an agreement to resolve any such disputes using class procedures.

The majority also had no answer to other language demonstrating the parties' intent to engage in bilateral arbitration. For example, the procedures that are addressed in the Agreement repeatedly refer to "*either* party," reinforcing the Agreement's bilateral nature. Pet. App. 29a-31a (emphasis added). The Agreement also limited the parties to one deposition per side (subject to the arbitrator's discretion to allow additional depositions "upon a showing of substantial need"). Pet. App. 32a. That presumptive limit on discovery underscores that the agreement contemplated only one-on-one arbitration; it is impossible to square with the panel majority's conclusion that the parties agreed to authorize class arbitration.

*3. The Ninth Circuit's decision cannot be justified as a neutral application of California contract law principles.*

The court of appeals purported to justify its interpretation of the Agreement as an application of California "state law contract principles." Pet. App. 2a. But that does not insulate its erroneous interpretation from FAA preemption for at least two reasons.

*First*, the "FAA requires," as a matter of federal law, a "contractual basis" for inferring an agreement to class arbitration beyond "the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687. State law rules do not control whether the agreement satisfies that federal principle. Although the panel below sought to characterize its approach as a straightforward application of state-law contract principles, that labeling is not conclusive.

*Second*, in contrast with the panel majority's purported application of California law, multiple California state courts have rejected arguments that similarly worded arbitration provisions in the employment context can support an implicit agreement to class arbitration. See *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012); *Kinecta Alternative Fin. Solutions, Inc.* v. *Super. Ct.*, 205 Cal.App.4th 506 (2012), disapproved of on other grounds by *Sandquist* v. *Lebo Auto., Inc.*, 1 Cal. 5th 233 (2016). In *Kinecta*, the Court of Appeal applied *Stolt-Nielsen* to "conclude that the parties did not agree to authorize class arbitration in their arbitration agreement" through language authorizing arbitration of "'any claim, dispute, and/or controversy that either *I* may have against the Credit Union * * * or the Credit Union may have against *me*, arising from, related to, or having any relationship or connection whatsoever with *my* seeking employment with, employment by, or other association with the Credit Union.'" 205 Cal.App.4th at 519.

Like the arbitration provision here (Pet. App. 25a), the arbitration agreement in *Kinecta* covered employment disputes under a variety of enumerated state and federal statutes. *Id.* at 511 n.1. And also like the arbitration provision here (Pet. App. 24a-25a), the arbitration agreement "ma[de] no reference to employee groups or to other employees," instead "refer[ring] exclusively to 'I,' 'me,' and 'my' (designating [the employee])." 205 Cal.App.4th at 517; see also *Nelsen*, 207 Cal.App.4th at 1130 (following *Kinecta* in a "nearly identical" case).

This contrary "California case law" further reveals that the panel majority's opinion is far from a neutral application of ordinary state-law contract

principles. *Imburgia*, 136 S. Ct. at 469. Rather, it is a "unique," result-oriented interpretation (*ibid.*), apparently motivated by the panel majority's preference for the class device and desire to "eva[de]" this Court's decisions in *Stolt-Nielsen* and *Concepcion*. Pet. App. 5a. As this Court put it in *Imburgia*, although "California courts are the ultimate authority on [California] law," it was for this Court to decide whether "that state law is consistent with the Federal Arbitration Act." *Imburgia*, 136 S. Ct. at 468. The same is true here.[5]

*4. The Ninth Circuit's reliance on the state-law* contra proferentem *doctrine was misplaced.*

The panel majority "cannot salvage its decision" (*Kindred Nursing Ctrs.*, 137 S. Ct. at 1427) by relying on the state-law canon of contractual interpretation providing that ambiguous terms are construed against the drafter. Pet. App. 3a-4a. According to the court of appeals, the "contractual basis" that the FAA requires (*Stolt-Nielsen*, 559 U.S. at 680) can be satisfied by merely concluding that an arbitration agree-

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[5] For the reasons just discussed, other circuits have uniformly rejected similar attempts to find agreement to class arbitration, holding the claims inconsistent with this Court's decision in *Stolt-Nielsen*. See, *e.g.*, *Opalinski* v. *Robert Half Int'l Inc.*, 677 F. App'x 738, 742 (3d Cir. 2017); *AlixPartners, LLP* v. *Brewington*, 836 F.3d 543, 553 (6th Cir. 2016); *Huffman* v. *Hilltop Cos., LLC*, 747 F.3d 391, 398-99 (6th Cir. 2014); *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, 599-600 (6th Cir. 2013); *cf. Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643-44 (5th Cir. 2012), abrogated on other grounds by *Oxford Health*, 569 U.S. 564 (concluding that an arbitrator's interpretation of the parties' arbitration agreement to permit class arbitration was inconsistent with *Stolt-Nielsen*).

ment is "ambiguous" (Pet. App. 3a) and then allowing the state-law *contra proferentem* maxim to do the rest of the work.

That reliance was misplaced for at least two reasons.

*First*, the canon does not apply because, as the dissent put it, "the Agreement was not ambiguous." Pet. App. 5a. Not one word in the arbitration provision suggested that the parties contemplated using class procedures in arbitration. As this Court held in *Imburgia*, "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." 136 S. Ct. at 470.

*Second*, the FAA forecloses the panel majority's reliance on a state-law canon to manufacture consent to class arbitration that the "FAA requires" to allow class arbitration to proceed. *Stolt-Nielsen*, 559 U.S. at 687. That federal-law standard cannot be satisfied by a state-law rule that does not rest on a finding of consent. The Court explained in *Concepcion* that "class arbitration, to the extent it is manufactured by [application of a state law doctrine] rather than consensual, is inconsistent with the FAA." 563 U.S. at 348.

In concluding that the state-law *contra proferentem* doctrine can justify imposing class arbitration notwithstanding the FAA's preference for traditional, bilateral arbitration, the court below cited *Sandquist* v. *Lebo Automotive, Inc.*, 1 Cal. 5th 233, 248 (2016) (see Pet. App. 3a), which in turn pointed to this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). But *Mastrobuono* did not hold, or even suggest, that

the *Federal* Arbitration Act takes a backseat to any *state*-law maxim.

*Mastrobuono* decided the question presented—whether the contract at issue authorized the parties to arbitrate punitive-damages claims—by applying the strong federal policy *favoring* arbitration. The Court first drew the pro-arbitration conclusion that punitive-damages claims are arbitrable absent a clear statement of the parties' contrary intent. 514 U.S. at 57-62. The Court then explained that (in the context of that case) construing the language of the arbitration provision against the drafter lent *further support* to the conclusion that the dispute was subject to arbitration. *Id.* at 62-63. Thus, this Court has never held that a state-law contract doctrine could trump the FAA when the two point in *opposite* directions.

If anything, the federal substantive law of arbitrability mandates a pro-arbitration presumption that would prevail over a contrary state-law doctrine. This Court recognized 35 years ago that the FAA "establishes that, as a matter of *federal law*, any doubts concerning the scope of arbitrable issues should be resolved *in favor* of arbitration, whether the problem at hand is the *construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added); see also *Kristian* v. *Comcast Corp.*, 446 F.3d 25, 35 (1st Cir. 2006) ("Where the federal policy favoring arbitration is in tension with the tenet of *contra proferentem* * * *, the federal policy favoring arbitration trumps the state contract law tenet.").

Here, that presumption calls for compelling arbitration as "envisioned by the FAA" (*Concepcion*, 563 U.S. at 351) rather than stretching to interpret the arbitration agreement to authorize the use of class arbitration, which is antithetical to the type of arbitration the FAA protects.

*5. Upholding the decision below would empower courts and arbitrators to impose class procedures on unconsenting parties and create substantial practical problems.*

Affirmance of the decision below would make it "trivially easy" for courts "to undermine the [FAA]." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1428. If garden-variety arbitration agreements like the one here could be interpreted to permit class arbitration, defendants who have entered into such agreements will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment. It is hard to imagine a result more inimical to the strong federal policy favoring the type of arbitration envisioned by the FAA.

Permitting class arbitration in these circumstances would trigger other serious adverse consequences.

1. The practical problems of class arbitration would be especially acute when class-action procedures are superimposed upon arbitration without clear agreement by the parties.

The res judicata effect of a class arbitration is doubtful at best, particularly under circumstances like those in this case. Because arbitration "is a matter of consent, not coercion" (*Volt*, 489 U.S. at 479), when an arbitration agreement does not clearly au-

thorize class arbitration, absent class members would have a powerful due process argument that they did not agree to be bound by an award resulting from an arbitration proceeding in which they did not participate. As Justice Alito put it in his *Oxford Health* concurrence (joined by Justice Thomas), "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." 569 U.S. at 574 (Alito, J., concurring).

At a minimum, these due process concerns increase the procedural complexity required. See *Concepcion*, 563 U.S. at 333 ("If procedures are too informal, absent class members would not be bound by the arbitration."). Even the notice and opt-out procedures employed in class-action litigation in court may not suffice: "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority in any way." *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring). That is because "silence" from absent nonparties as to a particular arbitrator's authority to conduct a class arbitration is not the same as the contractual consent that is required for that arbitrator to have authority over those nonparties. *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring) (citing 1 Restatement (Second) of Contracts § 69(1) (1979)).

The upshot of a class arbitration's vulnerability to collateral attack is that "absent class members [can] unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the bind-

ing effect of an unfavorable one.'" *Oxford Health*, 569 U.S. at 575 (Alito, J., concurring) (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546-47 (1974)). That result is palpably unfair. An absent "class member" would be able to recover under a favorable decision by the arbitrator, but could invoke due process principles to avoid being bound by an unfavorable decision.

2. The policy preference for class actions that may have animated the decision below is not a permissible basis under the FAA for imposing class arbitration.

Nearly three decades ago, this Court rejected the argument that arbitration should be denied in the employment context because the agreement did not provide for class procedures. *Gilmer* v. *Interstate/Lane Johnson Corp.*, 500 U.S. 20, 30-32 (1990) (compelling individual arbitration of a claim alleging a violation of the Age Discrimination in Employment Act). And in *Concepcion*, this Court specifically rejected policy arguments that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." 563 U.S. at 351; accord *American Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 238 (2013). As this Court recently underscored, "*Concepcion*'s essential insight" is that courts may not "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic Sys.*, 138 S. Ct. at 1623.

Moreover, the Ninth Circuit failed to heed this Court's repeated recognition that "there are real benefits to the enforcement of arbitration provisions" calling for traditional, bilateral arbitration, including "allow[ing] parties to avoid the costs of litigation."

*Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122-23 (2001).

Indeed, this Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 109, 123 (citing *Gilmer*, 500 U.S. at 30-32). On the contrary, the lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Ibid.*

Likely for these reasons, studies have shown that employees who arbitrate their claims are more likely to prevail than those who go to court. See, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *ibid.* A 2004 report compiled a number of employment arbitration studies and concluded that employees were 19% more likely to win in arbitration than in court. See Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), available at goo.gl/nAqVXe. As one scholar recently agreed, "there is no evidence that plaintiffs fare significantly

better in litigation [than in arbitration]"; rather, arbitration is "favorable to employees as compared with court litigation." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original).

### C. An Arbitration Agreement Permits Class Or Representative Procedures Only If The Agreement's Text Clearly And Unmistakably Authorizes Such Procedures.

This Court in *Stolt-Nielsen* "had no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." 559 U.S. at 687 n.10. For the reasons explained above, the Court can reverse the Ninth Circuit's judgment here without reaching that question because the Agreement's text contains *no* basis for an agreement to class arbitration.[6]

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[6] Because the parties here agreed that the court would decide whether their agreement permitted class arbitration, this case does not present the question—also left unresolved in *Stolt-Nielsen* (559 U.S. at 680) and *Oxford Health* (569 U.S. at 569 n.2)—whether the availability of class arbitration is among these gateway issues of arbitrability that are presumptively for a court to decide. That said, the fundamental differences between class and bilateral arbitration that this Court has recognized strongly indicate that the important decision of whether the parties agreed to traditional, bilateral arbitration or instead have agreed to arbitrate the claims of hundreds or thousands of absent parties is one that is presumptively for a court, not a mere procedural detail. *Cf. Stolt-Nielsen*, 559 U.S. at 685 (explaining that whether class arbitration is available is about far more than "merely what 'procedural mode' [is] available to present [a plaintiff's] claims").

If the Court nonetheless decides to address the question left open in *Stolt-Nielsen*, however, it should hold that the FAA requires the same "clear and unmistakable" indication needed in other contexts to depart from the FAA's default rules.

The Court has recognized that "gateway question[s]" of "arbitrability"—*i.e.*, "whether the parties have submitted a particular dispute to arbitration"—are presumptively for the courts, not arbitrators, to decide. *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Such gateway questions include, but are not limited to, "whether parties have a valid arbitration agreement at all" (*Oxford Health Plans*, 569 U.S. at 569 n.2) and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" (*Howsam*, 537 U.S. at 83).

Because the FAA imposes a default rule that these gateway issues of arbitrability are "for judicial determination," parties must "clearly and unmistakably provide otherwise" in order to contract around that rule. *Howsam*, 537 U.S. at 83 (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). The same rationale justifies a "clear and unmistakable" standard for contracting around the traditional, bilateral mode of arbitration. See pages 10-11, *supra*.

This Court has also explained that the "clear and unmistakable" standard is meant to prevent courts from "forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 84. Just as "courts might hesitate to interpret silence or ambiguity" to override the default rule that questions of arbitrability are for a court to decide (*First Options*, 514 U.S. at 945), so too should courts

require far more than silence or ambiguity before imposing class procedures on a party that did not clearly consent to them.

The clear and unmistakable standard further has the virtue of familiarity—courts already apply it in related contexts. And it is appropriately stringent, requiring an express mention (or something close to it) of class or representative arbitration in the contract before class procedures may be imposed. But it is also sufficiently flexible to account for the various ways parties may demonstrate their clear intent to authorize class arbitration—without being reduced to a "magic words" test.

In short, the FAA's default mode of arbitration is bilateral arbitration, and the Court should hold that the FAA requires a clear and unmistakable indication to the contrary in the parties' agreement to override that presumption.

## II. There Is No Jurisdictional Issue.

At the petition stage, Varela argued for the first time that the district court's order compelling class-wide arbitration was a non-appealable order "directing arbitration to proceed." Opp. 20-22 (citing 9 U.S.C. § 16(b)(2)).

That argument is wrong, which is presumably why the Court concluded that it posed no obstacle to granting review.

To begin with, the district court's order also dismissed Varela's claims. Pet. App. 23a. That dismissal unquestionably rendered the order final. As this Court held in *Randolph*, when a district court orders arbitration and dismisses the plaintiff's claims, the order is "'a final decision with respect to an arbitra-

tion' within the meaning of § 16(a)(3), and an appeal may be taken." 531 U.S. at 86-87 (quoting 9 U.S.C. § 16(a)(3)).

Varela noted at the petition stage that the district court's dismissal here was "without prejudice," while the dismissal in *Randolph* was "with prejudice." Opp. 23. But the dismissal here had the exact same effect as the dismissal with prejudice in *Randolph*: it "disposed of the entire case on the merits" and "left no part of it pending before the court." 531 U.S. at 86. A dismissal in this context is without prejudice "only in th[e] sense" that it does not "preclud[e] the parties from bringing a new action after completing arbitration," which "is not enough to show that the dismissal was interlocutory rather than an appealable final decision" under Section 16(a)(3). *Interactive Flight Techs., Inc.* v. *Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001) (citing *Randolph*).[7]

Varela also argued that the district court's dismissal "was not adverse to Lamps Plus." Opp. 23. But the court's order compelled a *class-wide* arbitration that Lamps Plus never sought—and actively argued *against*. See ER 48-51.

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[7] Every other circuit to reach the issue has similarly held that a dismissal without prejudice in favor of arbitration is a final, appealable order. See *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005); *Westlake Styrene Corp.* v. *P.M.I. Trading Ltd.*, 71 F. App'x 442, 442 (5th Cir. 2003); *Blair* v. *Scott Specialty Gases*, 283 F.3d 595, 601-02 (3d Cir. 2002); *Salim Oleochemicals* v. *M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002), abrogated on other grounds by *Katz* v. *Cellco P'Ship*, 794 F.3d 341 (2d Cir. 2015).

Indeed, even if there had been no dismissal, Lamps Plus was entitled to appeal because the district court's order effectively *denied* Lamps Plus's motion to compel arbitration. Lamps Plus asked for "an order directing that * * * arbitration proceed *in the manner provided for in such agreement*"—i.e., on an individual basis. 9 U.S.C. § 4 (emphasis added); ER 144. That the district court purported to grant Lamps Plus's motion is not controlling: in matters of appellate jurisdiction, this Court is "concerned, not with form, but with substance." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 259 (1933).

Varela is wrong in contending that Lamps Plus received an "order granting relief it requested," and asserting that Lamps Plus complained only because the arbitration ordered was "not in the procedural manner [it] preferred." Opp. 22-23. This Court in *Stolt-Nielsen rejected* the proposition that class-wide arbitration involves "merely what 'procedural mode' is available to present [a party's] claims." 559 U.S. at 687. It recognized that the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.* at 686. Accordingly, Lamps Plus was entitled to appeal an adverse decision imposing these fundamental changes over its objections.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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